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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 J.T. COLBY & COMPANY, INC., et
4 al.,

Plaintiffs,

5 v.

11 CV 4060 (DLC)

6 APPLE INC.,

7 Defendant.

8 -----x

9 New York, N.Y.

10 April 27, 2012

3:40 p.m.

11 Before:

12 HON. DENISE COTE,

13 District Judge

14 APPEARANCES

15 ALLEGAERT BERGER & VOGEL
Attorneys for Plaintiffs
16 PARTHA PRATIM CHATTORAJ

17 QUINN EMANUEL URQUHART & SULLIVAN LLP
Attorneys for Plaintiffs
18 ROBERT LLOYD RASKOPF

19 KIRKLAND & ELLIS LLP
Attorneys for Defendant

20 DALE MARGARET CENDALI
CLAUDIA ELIZABETH RAY
21 BONNIE LEIGH JARRETT

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1 (In open court; case called)

2 THE COURT: Welcome, everyone.

3 This case has been reassigned to me. I know you had a
4 February 27th conference with Judge Forrest. I have read the
5 transcript of that conference. I know there's a governing
6 scheduling order in this case, with discovery to be concluded
7 June 15th, a summary judgment motion to be fully submitted
8 July 27th, and a trial date of October 22nd. A protective
9 order has been issued in this case.

10 I have a dispute with respect to discovery issues, and
11 those are principally brought on by the letter from defense
12 counsel. Plaintiff's counsel, in addition, raises the issue of
13 a desire to file an amended complaint. There is a dispute
14 about whether or not consent will be given to that and the
15 impact it might have on any schedule that now exists in this
16 case.

17 There was a motion to withdraw as counsel of record
18 for the plaintiffs, and a reply declaration came in on that
19 motion, indicating that the motion is now moot. I don't know
20 that that's actually true. I think there probably is still a
21 motion for Manatt Phelps to withdraw and in fact to be replaced
22 by plaintiff's counsel who are here.

23 Is a lawyer for Manatt Phelps present in the
24 courtroom?

25 MR. CHATTORAJ: I was informed by my colleagues at

C4rkjtcc

CONFERENCE

1 Manatt Phelps that they will not be here today.

2 THE COURT: It would have been a courtesy to the Court
3 for them to be present. Thank you.

4 MR. CHATTORAJ: I will convey that to them, your
5 Honor.

6 THE COURT: Thank you.

7 Welcome, counsel for the plaintiffs, Mr. -- is it
8 Chatteraj?

9 MR. CHATTORAJ: That's correct, your Honor, perfect.

10 THE COURT: Thank you.

11 -- and Mr. Raskopf.

12 I plan to address any outstanding issues. They
13 include who pays for the hard drive being processed,
14 confirmation that the hard drive is the only source of the
15 plaintiff's documents, scheduling of expert reports, scheduling
16 of the plaintiff's deposition, scheduling of the inspection of
17 the plaintiff's quote-unquote warehouse, and of course the
18 amended complaint issue.

19 With respect to the hard drive issue, I've read the
20 parties' submissions on that. Does anyone have anything they
21 want to add briefly? Mr. Chatteraj?

22 MR. CHATTORAJ: Well, your Honor, it's my
23 understanding, based on my review of the correspondence between
24 the parties, that the hard drive cost-shifting issue is the
25 basis for Apple's counsel not to consent to the Manatt Phelps

C4rkjtcc

CONFERENCE

1 firm's motion to withdraw. That may well be buttressed by the
2 fact that we circulated fully executed stipulation to
3 substitute counsel yesterday, which has not been executed by
4 Apple's counsel.

5 So I suppose that my preference, unusually for
6 plaintiff, would be to let Ms. Cendali explain her
7 understanding of why it is that my client should pay the costs
8 associated with that hard drive, and then I can respond. The
9 reason --

10 THE COURT: She's already done that on paper. I think
11 this has been addressed on paper by both sides.

12 MR. CHATTORAJ: Very well, your Honor.

13 THE COURT: I don't need any additional oral
14 statement, but I wanted to give you the opportunity to say
15 anything if you'd like to.

16 MR. CHATTORAJ: Yes. What I would like to say about
17 it is that I am indeed new counsel. I may well not have made
18 the same strategic judgment as my predecessors, in providing
19 this hard drive to defense counsel. It would have been my
20 preference to actually engage an e-discovery vendor and to
21 process that hard drive myself and review it before providing
22 it to the defense counsel.

23 Now, to some degree, that ship has sailed, and I
24 recognize that, and I certainly don't want to do anything to
25 impede the moving forward of the case and to move us as quickly

C4rkjtcc

CONFERENCE

1 as possible toward the October 22nd trial date.

2 That being said -- I'm mainly inferring this, but also
3 based on conversations with my predecessor -- I understand that
4 the reason that the hard drive was provided to defense counsel
5 was because plaintiffs didn't wish to incur the cost of
6 actually doing the processing and so on. For defense counsel
7 now to say, well, this isn't fair, you have to pay the cost of
8 doing this, sort of defeats the purpose of providing it.

9 So all I would say is, if the Court is inclined to
10 shift the costs in the way that defense counsel wishes, my
11 request, as an incoming counsel, would be to permit us to get
12 the hard drive back, perhaps get a certification from defense
13 counsel that they destroyed any copies and don't have any
14 copies, and ideally certification that they have not yet begun
15 to review it in light of their stated problem with the expense,
16 and that we would then process it in the ordinary course. That
17 would be my fallback position if my predecessor's counsel's
18 position is not adopted by the Court.

19 THE COURT: If what position is not adopted?

20 MR. CHATTORAJ: My predecessor's view was that Apple's
21 counsel should pay the money, process it, produce information
22 and provide a copy set to us, to plaintiffs.

23 THE COURT: Thank you.

24 MR. CHATTORAJ: That is his position. Thank you.

25 THE COURT: Ms. Cendali.

C4rkjtcc

CONFERENCE

1 MS. CENDALI: Your Honor, not at the last conference,
2 whose transcript you alluded to, but the conference before
3 that, when the hard drive came up, I think the record was clear
4 that Judge Forrest said you need to comply with discovery,
5 plaintiff, you're the plaintiff in this case, you need to act
6 like the plaintiff, you can't just sit there and do nothing
7 because new counsel is coming in, and you have to produce your
8 documents. And they said, OK. And she gave a deadline, and
9 she said to them, if you're not going to produce by that
10 deadline, you need to give the hard drive to Ms. Cendali. And
11 they said OK.

12 There was no discussion whatsoever about who would
13 bear the cost of that. And we all read the Zubalake case, and
14 we all know that there needs to be a motion for that. As we
15 said in our papers, it seems a little unseemly and usual -- we
16 have Manatt, we have two new firms, we have a litigation
17 planning firm, we have Mr. Colby, the sole proprietor of
18 plaintiffs, who has apparently homes on Shelter Island and Park
19 Avenue -- it seems odd for Apple having to fund its own lawsuit
20 against itself. We believe that they should pay that cost.
21 It's already at the e-discovery vendor, they're working through
22 it. It was delivered, the output, but we do think, it's their
23 responsibility and their cost.

24 There's been no showing of any of the factors that
25 would rise to cost-sharing.

C4rkjtcc

CONFERENCE

1 THE COURT: I've looked at the transcript of the
2 February 27th conference and in particular at page 36 of that
3 conference, where the hard drive issue does come up. I agree
4 that there wasn't any specific or explicit discussion of the
5 cost-shifting issue, but the plaintiff was clearly given the
6 opportunity to process and produce responsive documents to the
7 defendant, chose not to, chose instead to provide the entire
8 hard drive to the defendant. I am not going to shift the cost
9 to the defendant of the processing of the hard drive. Apple
10 may serve an invoice on the plaintiff, and that must be paid
11 within two weeks of service of the invoice.

12 Can you confirm, Mr. Chatteraj, that the only source
13 of the plaintiff's documents is the hard drive?

14 MR. CHATTORAJ: Your Honor, at this time I'm not in a
15 position to make that representation. I do believe in fact
16 that there are hard copy documents that may exist that would
17 not be within that hard drive.

18 THE COURT: And that were responsive to the discovery
19 demands already served on the plaintiff?

20 MR. CHATTORAJ: I myself have not participated in a
21 search for documents, your Honor, so it would be speculation on
22 my part, so I'm not comfortable making a representation to the
23 Court based on mere speculation.

24 THE COURT: Thank you very much.

25 I'm going to require any document production that

C4rkjtcc

CONFERENCE

1 needs to be made to comply with the duties imposed by the
2 Federal Rules, be completed by next Friday. That would be
3 May 4th.

4 Let's set a schedule for service of expert reports.
5 Is the plaintiff intending to call experts? I know there was a
6 discussion at the February 27th conference of three potential
7 kinds of experts. Is the plaintiff intending to call experts?

8 MR. CHATTORAJ: Yes, your Honor.

9 THE COURT: In what fields?

10 MR. CHATTORAJ: We will be calling an expert in to
11 assess damages and evaluation of intellectual property at
12 issue. We will be calling an expert on marketing and consumer
13 psychology, and will be -- it is currently something that we
14 are discussing, I don't want to make a commitment to this
15 because we have just gotten into the case strategic issue, but
16 if we were to call a third expert, it would be an industry
17 custom and practice expert on trademark search.

18 Your Honor --

19 THE COURT: Let me ask the defendants: Other than
20 rebuttal experts, is the defendant planning to call any expert
21 on an issue on which the defendant bears the burden of proof?

22 MS. CENDALI: I don't think we bear the burden of
23 proof on it, but I know that plaintiffs apparently are not
24 calling a survey expert, which is typically the case in
25 trademark cases. We think there are obvious reasons why

C4rkjtcc

CONFERENCE

1 they're not planning on calling a survey expert, so most likely
2 we might want to do so affirmatively.

3 Your Honor, I don't know if this is the right time,
4 but as you're talking about service and expert reports, I did
5 want to discuss the issue of a schedule and the trial date, if
6 the Court will hear me on that.

7 THE COURT: Have the parties discussed that with each
8 other --

9 MS. CENDALI: No.

10 THE COURT: -- the scheduling issues?

11 MS. CENDALI: We didn't know until yesterday that they
12 were definitely coming in. Since January there's been talk
13 that some firm or firms were going to come in. The last
14 communication we heard was in an email to Judge Forrest to the
15 effect that they were still negotiating with their litigation
16 funding firm, so it wasn't until yesterday that counsel
17 appeared.

18 It seems most productive for us to initially have a
19 meet-and-confer and to try to work out a sensible schedule. As
20 you can tell from the transcripts, your Honor, initially Apple
21 was doing everything it could to try to meet the existing
22 schedule, but as absolutely nothing has happened, we're now at
23 the point of where we have extreme prejudice; we have to cram
24 six months of discovery into a very short period of time.

25 THE COURT: We're going to take a recess for about ten

C4rkjtcc

CONFERENCE

1 minutes. So, Counsel, I'm going to ask you to meet and confer
2 with respect to the issues that I have listed and any issues
3 you want to add to the list. And I will take this criminal
4 matter and then we'll reconvene.

5 MS. CENDALI: May we go out in the hallway, your
6 Honor?

7 THE COURT: Yes.

8 MS. CENDALI: Thank you.

9 MR. RASKOPF: Thank you, your Honor.

10 (Recess)

11 THE COURT: So Ms. Cendali, do you have agreement?

12 MS. CENDALI: Yes, your Honor. We have had the most
13 productive ten minutes we have had in this case so far.

14 We agree that, with your Honor's permission obviously,
15 that it would make sense to move the trial date, given the
16 state of discovery. What we have agreed to, for your Honor's
17 consideration, is a proposed schedule for the close of fact
18 discovery for August 15th; affirmative expert reports,
19 September 15th; rebuttal expert reports, October 26th; close of
20 expert discovery, November 23rd, Daubert motions, summary
21 judgment motions, dispositive motions, et cetera,
22 December 21st; opposition briefs to such motions, January 25th,
23 taking into account the holidays; reply briefs to such motions,
24 February 5th; and then beyond that, we thought it was really up
25 to you. Some judges say, I'll give you a trial date once I

C4rkjtcc

CONFERENCE

1 know what I want to do at that point. That's actually what we
2 would prefer, but that's one thing that we agreed to.

3 We have also discussed, and I can report on, the
4 status of various other discovery issues that you mentioned
5 that relate to our letter. Would you like me to do that at all
6 once?

7 THE COURT: Sure.

8 MS. CENDALI: OK.

9 With regard to the amended complaint, we had consented
10 to the draft that we had been shown by Manatt, but new counsel
11 has said that they would like the opportunity to review the
12 pleadings and may do a different amendment, and we have agreed
13 that if and when they do that, we will look at it and we'll see
14 where we are as to whether we consent or not.

15 With regard to the deposition of Mr. Colby, at the
16 time of the letter we were needing a hard date because we
17 didn't get the hard date. At this point we, Apple, are not
18 asking to set a date certain for his deposition today, on the
19 theory that we need to see what the documents will show and
20 that we will hopefully amicably reach a mutually agreeable date
21 with new counsel. They have indicated that they will produce
22 him. And until, and if, there's an issue, we don't need you to
23 get into that level of minutia.

24 With regard to the issue of the inspection, what we
25 want is to inspect both of Mr. Colby's and his company's

C4rkjtcc

CONFERENCE

1 premises. There is the New York address, which is the address
2 in the complaint, and on their website is their business
3 address, and then we have learned there is also his Shelter
4 Island address, which apparently where he -- also is perhaps
5 referred to for his website. So we want to inspect both of
6 those premises and take video and a picture of the business
7 premises and see what's there, see what signage is up, see if
8 it really is a business premise or not, and the like.

9 Previous counsel had had two objections to that. One
10 of them was that they didn't want us to go to the New York
11 address. And they said, well, it's not really a business
12 address. And we said, well, since it's the address in the
13 complaint and in your website, it would be relevant to our
14 overall position that this is an opportunist plaintiff, an
15 opportunist who's trying to get a windfall from Apple; we'd
16 like to see what's at that address regardless.

17 And then the second issue was the plaintiff's previous
18 counsel had said we'd be limited to only taking photographs of
19 books as opposed to something else about the premises. And our
20 position was, we shouldn't be so limited. Of course rights
21 would be reserved for whatever motions in limine might be
22 appropriate, but if there is or isn't signage or anything else
23 like that, I think we're entitled to present that.

24 We raised both of these issues with new counsel.
25 Correct me if I am wrong, but they were not willing to commit

C4rkjtcc

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1 to this issue. We are concerned about potential spoliation and
2 other issues with regard to this. We have been pressing for
3 this for a long time. So we really would like the right, and
4 we respectfully request that the Court issue an order letting
5 us inspect both premises along the lines that I just said.

6 THE COURT: Mr. Chatteraj?

7 MR. CHATTORAJ: Yes, your Honor. My view is that to
8 the extent that Apple is raising what we view as sort of a
9 spurious issue as to whether or not my client has a bona fide
10 business, we think in the first instance document production,
11 much of which will probably be on this hard drive, will clearly
12 show a large volume of sales and large volumes of dollars and
13 books being sold year in and year out over a very long period
14 of time, in fact, a much greater period of time than that
15 within which Apple has sold books. So, to the extent that the
16 effort is to show up at my client's business addresses and sort
17 of try to make his business look like a sort of less than it
18 is, in this era of sort of virtual businesses and online
19 businesses, it's not clear to me why these inspections are
20 necessary.

21 That being said, based on my somewhat limited
22 conversations with my client and my predecessor, I just feel
23 like -- when I said I wasn't willing to commit, it's because I
24 just don't have a well articulated understanding of the basis
25 of the objections. My feeling is that this case is going to be

C4rkjtcc

CONFERENCE

1 decided based on, for example, the documents and the other
2 evidence showing the sales and so on. And I think that this
3 allegation that it's a de minimis business is going to rapidly
4 fall by the wayside once we actually get into the discovery.

5 But at the same time, as a trial lawyer, I really
6 think that you could do a lot with photographs that could be
7 helpful to both sides, so I don't have strong feelings about
8 it. And my view is simply that I'd like to reserve judgment on
9 withdrawing objections until I at least have a better
10 understanding of what those objections are. I think I'd be
11 doing a disservice to my client.

12 THE COURT: That's fair enough, Mr. Chatteraj. I'll
13 let you notify Ms. Cendali about your position on Tuesday. And
14 if there remains a dispute on this, I'll hear counsel later in
15 the week and we'll resolve this next week. You should assume
16 that any inspection will take place the following week; that is
17 ordered. So we'll get the inspection done and behind us if
18 there's going to be one.

19 MR. CHATTORAJ: Very well, your Honor. Thank you.

20 THE COURT: Good.

21 Ms. Cendali, did you have a further report to me?

22 MS. CENDALI: Yes. The last issue we had just started
23 to talk about, but you had asked to tee up with you whatever
24 else there was, and this issue wasn't specifically in the
25 letters, I don't think, because it was more recent, and that

C4rkjtcc

CONFERENCE

1 is, Manatt served objections to our 30(b)(6) request, and they
2 also served objections to our RFA request. And in every single
3 case they put the same identical boilerplate paragraph
4 objecting to give us any information. So we would serve an
5 RFA, "admit that you have not sold books," and their objection
6 would be, they don't have sufficient information to admit or
7 deny.

8 Now, part of me would just like to move for summary
9 judgment immediately on this, but I don't know if that will win
10 the day at the end of the day. So I'm not quite sure what to
11 do about this. Perhaps the most logical thing to do, though --
12 it seems not fair and an unnecessary expense for Apple to have
13 to give them a do-over on these objections, but I do think they
14 were improper, and either they should do them over or we would
15 like some motion practice with regard to them.

16 THE COURT: OK, we will all strive mightily to avoid
17 motion practice.

18 So why don't we use the May 4th date, where the
19 document production is being perfected, to also allow any
20 amended objections or discovery responses generally. So you
21 will be in a better position a week from today, Ms. Cendali, to
22 know whether or not the objections to the requests you have
23 made merit further discussion with the Court.

24 MS. CENDALI: I think, your Honor, that that's our
25 list of our productive meeting. Plaintiff may have others but

C4rkjtcc

CONFERENCE

1 that's where we are. We realize going forward that everyone
2 has reserved rights to -- new issues we fully expect will come
3 up, and everyone has reserved all rights to meet and confer on
4 those issues.

5 THE COURT: Let me talk a little bit about my
6 procedures.

7 If you have a discovery dispute, you have to meet and
8 confer and try to resolve it in good faith. If you still have
9 a dispute, write me a letter no longer than -- my letters are
10 even shorter than Judge Forrest's -- two pages, but in that
11 letter make sure that you indicate that you have met and
12 conferred and been unable to resolve the issue. And then I'll
13 get you on the phone or, if it seems a terribly complex issue,
14 we will meet in court and try to resolve it and I will give you
15 a ruling. I may not wait for a response letter; I may just get
16 you on the phone.

17 I'm going to adopt the proposed schedule. I'm not
18 going to schedule a pretrial order. But if the parties do not
19 end up filing summary judgment motions, I want letters on
20 November 23rd indicating that there will be no summary judgment
21 practice, in which case I'll get out a separate scheduling
22 order for a pretrial order.

23 I'm going to act from this point on as if the
24 plaintiff is bound by all actions taken by his current counsel.
25 Should he change counsel yet again, we're not going to allow

C4rkjtcc

CONFERENCE

1 another round of amended pleadings or revised discovery
2 requests or anything else.

3 We need an end date with respect to the amendment of
4 pleadings. And why don't I give plaintiff's counsel an
5 additional week beyond May 4th, so May 11th, for the filing of
6 any amended pleading.

7 I take it nobody needs to join any additional party,
8 but that May 11th date is going to be for amendment and
9 joinder, so that we know as of that date the pleadings are
10 closed.

11 I think this is a case in which probably it makes
12 sense to have expert discovery before summary judgment
13 practice, but I just want to flag that as an issue. If
14 counsel, after they proceed further in this case, think that it
15 would be more efficient and cost effective to have a summary
16 judgment motion before expert discovery, that's fine with me.

17 Also, if there's an immediate summary judgment that
18 can be filed on a discrete issue that a party thinks that I can
19 grant even now, today, before discovery, fact discovery, is
20 completed, I'd be open to that, if there's something that would
21 help the parties understand the law that will be applied here
22 and the likelihood of success, even if it doesn't fully resolve
23 the case.

24 Mr. Chatteraj, are there any additional issues that
25 you would like to raise at today's conference?

C4rkjtcc

CONFERENCE

1 MR. CHATTORAJ: Yes, your Honor. Just a few
2 housekeeping issues, if I may.

3 I know that your Honor's individual practices require
4 that the parties provide a courtesy copy set of the pleadings
5 in advance of the conference. Although this is not a
6 preliminary conference, it is our first conference before you,
7 and I have brought a courtesy copy set since we were just came
8 in yesterday.

9 THE COURT: Thank you. You may hand it up.

10 MR. CHATTORAJ: I will just show my adversary.

11 MS. CENDALI: I'm convinced that is what it is. Thank
12 you, Mr. Chattoraj.

13 MR. CHATTORAJ: The only change is the stamp that says
14 "Courtesy Copy" on the upper right-hand corner of both
15 documents. There are a lot of exhibits, so it might be
16 helpful.

17 Another issue is the question of the substitution of
18 counsel. As you correctly pointed out, your Honor, there is
19 currently before the Court a motion by Manatt Phelps to
20 withdraw. It is the position of Manatt Phelps, as I understand
21 it, that it is a moot motion because of our appearing in the
22 case. And as I mentioned at the outset of today's conference,
23 we are prepared to enter into stipulation with opposing counsel
24 substituting us, which we could then hand up right now. I even
25 have the originals for your Honor's endorsement, and was

C4rkjtcc

CONFERENCE

1 wondering if that is something that we should do today.

2 MS. CENDALI: Your Honor, we have consented to the
3 substitution. People are allowed to pick their attorneys of
4 choice. I have to say, before everything happened yesterday,
5 our initial thought for this conference was to come here
6 requesting sanctions because it's been a sorry, tedious state
7 the past four months, where my client has had the unnecessary
8 expense of depositions confirmed, depositions canceled, the
9 panoply of different events.

10 It does seem bothersome to me, as an officer of the
11 court, that when Judge Forrest was clear that Manatt still had
12 a responsibility and had to move forward with the case, that it
13 chose not to, and it doesn't seem right that they effectively
14 took for themselves the stay that they had put in their motion
15 papers.

16 That being said, I'm certainly powerless to do
17 anything about it. Whether some form of sanction might be
18 appropriate, I certainly could believe that's the case, but I
19 understand that it's a difficult situation and sanctions are
20 not issued lightly.

21 THE COURT: Well, let me just say that I will accept
22 the appearance of incoming counsel for the plaintiff. I don't
23 consider the motion by Manatt moot. Instead, I'm going to
24 grant the motion and grant their request to withdraw on the
25 case.

C4rkjtcc

CONFERENCE

1 And the history of the failures with respect to the
2 plaintiff pursuing discovery diligently, having filed the case
3 and imposing burdens on defense counsel through his failure to
4 act as you would want a plaintiff to act, to prosecute his own
5 claims diligently, it's part of the history in this case. I'm
6 not going to ask for a sanctions motion now. You have the
7 rights to file whatever you want to file, but I think the
8 appropriate way, from my point of view, to address this is to
9 just recognize it's the history in the case, to have every hope
10 and confidence that none of that will be repeated, and that we
11 move forward here towards the merits. But if something happens
12 again and the issue appears in front of us and looms large and
13 defense counsel want to bring a motion, they can draw on that
14 whole history.

15 Mr. Chatteraj, I don't know if I finished asking you
16 if you had any other issues.

17 MR. CHATTORAJ: I did have a couple of small issues.
18 For purposes of the record, let me be clear: I'm not sure of
19 what communications took place before we appeared in this
20 matter, but we have not ruled out using a survey expert. When
21 I referred earlier to a marketing and consumer psychology
22 expert, it was within my contemplation that a survey might be
23 done. All I can say is, at this juncture I'm not sure whether
24 we'll do a survey or not, but I wouldn't want to mislead either
25 Ms. Cendali or the Court into thinking that we're not doing a

C4rkjtcc

CONFERENCE

1 survey as part of the expert process. It's just not clear
2 right now.

3 Also --

4 THE COURT: Can I interrupt?

5 MR. CHATTORAJ: Yes, you may.

6 THE COURT: We have sophisticated counsel on both
7 sides. I know you are proposing a date, and I will get out a
8 scheduling order of the filing of expert motions
9 September 15th. I expect it will be helpful to both sides to
10 work on interim scheduling dates with respect to expert
11 discovery where you do more firmly advise each other of the
12 areas and perhaps the identity of experts. And I'm going to
13 leave that for you to discuss among yourselves.

14 MR. CHATTORAJ: Thank you, your Honor. That makes a
15 lot of sense to us.

16 Just on some specific discovery issues: I will say --
17 I have to say this because I'm very proud of myself -- in the
18 last 24 hours I basically reviewed the entirety of Apple's
19 production to date. It was about 15,000 pages. Without going
20 into detail, because I know that a substantive argument isn't
21 welcome at this time and not appropriate, I did discern
22 numerous deficiencies specifically with respect to certain
23 information that we feel we are entitled to. During the
24 meet-and-confer we just had, I raised some of these issues and
25 indicated we hoped to meet and confer on these issues; and if

C4rkjtcc

CONFERENCE

1 that failed, we would have to have motion practice.

2 I was informed some of the issues may have already
3 been resolved in the past. So what I need to do is go back and
4 look at the conferences that took place before Judge Batts and
5 then before Judge Forrest and then see, but certainly our view
6 is that there is a substantial amount of material that needs to
7 be produced for the parties even to have an idea of where they
8 stand for purposes of resolution of the case, much less
9 actually trying the case in a few months.

10 So I just wanted to prepare the Court for a very
11 different tenor of the nature of discovery in this case. We
12 certainly do intend to honor all of our discovery obligations
13 and the dates set forth by the Court, but we also intend to
14 redress what we see as pretty substantial deficiencies that
15 really no one has brought to the Court's attention until now,
16 in written form at least.

17 THE COURT: Well, the great unknown in this case is
18 not whether Apple has an electronic books app, the great
19 unknown in this case is, what does the plaintiff have and what
20 are his rights based on that?

21 And to the extent you're alluding to discovery of
22 Apple with respect to profits and sales, you're going to have
23 to figure out a way to do that that is not burdensome, narrowly
24 focused, and does not become a significant imposition with
25 respect to the discovery, the nature of discovery in this case.

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1 MR. CHATTORAJ: Your Honor, I promise you that the way
2 I practice law is that I don't do discovery to cause pain --
3 we're just going to look for the truth -- and I completely
4 accept that, your Honor.

5 THE COURT: OK.

6 MR. CHATTORAJ: What I would say is that there is --
7 and I accept your Honor's view based on what's been presented
8 in the past in this case, that the big issue is what my clients
9 have. We're very confident in that. We do think that
10 discovery, an additional discovery, needs to be done on the
11 question of what Apple has. And we think that we will be able
12 to present, based on discovery I have already seen and our
13 continued investigation, that Apple's own rights to the alleged
14 mark are quite infirm. But that I understand is also for
15 another time.

16 What I'd also like to bring to the Court's attention
17 is that we have received a ruling in which my client has,
18 notwithstanding the page 36 of the transcript where Judge
19 Forrest said that Apple would bear the burden, is going to be
20 paying his adversary to do the processing of this hard drive,
21 and in the context of sanction and so on, I think -- I've
22 already expressed my view, perhaps improvidently, but that was
23 a strategic misstep by my predecessor. In any event, I'd just
24 like that to be taken into account. They are paying \$19,000
25 they certainly didn't expect to have to pay when they made the

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1 choice to do what they did.

2 THE COURT: That is actually a very remarkably low
3 number, in my mind. He filed the suit or the corporations
4 filed the suit. It's expensive to engage in discovery. They
5 made a choice.

6 MR. CHATTORAJ: Yes, your Honor. And, in fact, let me
7 make it clear, I am not in any way questioning the equities at
8 all. The reality is, as I said before, what I would want to do
9 is take the hard drive back and perhaps spend more money doing
10 the processing. I just want to make it clear, because it's not
11 clear from the record in the transcript, we have engaged an
12 ediscovery vendor -- it's been the last two to three days -- we
13 have already uploaded all of the materials produced by all the
14 parties. And so the point is we're doing this right now.
15 Under the ESI requirements of the Federal Rules, under the
16 Sedona Conference gold standard, things are going to change.
17 We're doing this right.

18 THE COURT: Good.

19 MR. CHATTORAJ: And I just want to make it clear,
20 we're going to spend the money that's necessary to do this
21 right.

22 THE COURT: Thank you, Mr. Chatteraj.

23 MR. CHATTORAJ: My colleague wishes to address the
24 Court. I'm going to sit down --

25 THE COURT: OK.

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1 MR. RASKOPF: -- unless that's not acceptable to your
2 Honor, in which case I'll just whisper --

3 THE COURT: No, no. Mr. Raskopf, I'm afraid I have
4 other matters waiting in chambers, so I'm happy to hear from
5 you on anything that you think is important for me to hear.

6 MR. RASKOPF: One minute?

7 THE COURT: Sure.

8 (Pause)

9 MR. RASKOPF: When your Honor said no revised
10 discovery requests, you said you weren't going to entertain any
11 more discovery, I guess, this is an issue, it may be an
12 issue -- I just want to tee it up for your Honor, that it's a
13 possibility that we will be coming back, because perhaps the
14 way we framed discovery did not call for Apple to inform us of
15 the revenues derived from the download of iBooks through the
16 iBookstore and the iBook application. Obviously, as your Honor
17 knows, one of the remedies, in a damages case brought in a
18 matter like this, is disgorgement of the profits of the
19 defendant.

20 So we were told that we are not going to get that
21 information. And I know your Honor doesn't want to see seven
22 different maybe ways that we could look at what the value of
23 this case is, but we really want to try to settle it -- I'm
24 here to get rid of this if I can -- but I know I'm not going to
25 be able to do that if I'm not going to have access to the kinds

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1 of information that is, I think, just basic to a disgorgement
2 of profits analysis.

3 So just I'm just bringing this to your Honor's
4 attention.

5 THE COURT: I think the idea that this case could be
6 settled based on some understanding of the net profits from the
7 Apple business, associated with the iBooks app, is a
8 fascinating one. Again, I just want to say, I think the first
9 bit of information that has to be developed is the plaintiff's
10 rights and the nature and scope of the plaintiff's business.

11 MR. RASKOPF: Your Honor is going to see, I represent,
12 that this is a legitimate business, and has been for a long
13 time, and it's a real business. So this is not any -- it's a
14 pretty classic reverse confusion case. It hasn't been -- the
15 documents haven't been assembled very well, but it's a case
16 that is capable of being well assembled, and we plan to do
17 that.

18 So I'm not trying to suggest, oh, you know, just turn
19 something over to me and then I'll make -- I'll try to get
20 something worked out with you, without you understanding what
21 my client's business is about.

22 THE COURT: Good. So, Mr. Raskopf, thank you for
23 bringing to my attention the need to address the issue of
24 settlement. I assume we need to see what's on the hard drive.
25 I think we need to see, probably need a visual inspection of

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1 the quote-unquote warehouse, at a minimum, and this document
2 production on May 4th, and perhaps the plaintiff's deposition.
3 But at that point, I expect the parties would be in a position
4 to contemplate serious settlement discussions.

5 Do you agree, Mr. Raskopf?

6 MR. RASKOPF: I don't -- I agree that that is a
7 definite step toward the settlement resolution. Now, if we're
8 told, after our documents and testimony is shown to Apple, they
9 still want to take this position that he is illegitimate, he's
10 looking for a windfall or something like that, then obviously
11 we're not going to settle it, because we believe that he is.
12 But having said that, the other component of that is that we
13 need to have some basic understanding of the revenue stream
14 from the iBookstore, from books downloaded through the
15 iBookstore and we don't have it and we were told we are not
16 going to get it.

17 THE COURT: Well, I'll let you meet and confer about
18 that. And I am sure you'll read the February 27th transcript,
19 among other things, before that meet-and-confer process.

20 I'm going to issue a scheduling order that would have
21 you contact the magistrate judge for settlement discussions to
22 occur. And the contact time in my order will read, "you must
23 contact the magistrate judge no later than June 29th." There
24 will be an immediate order of reference, so you can contact the
25 magistrate judge earlier.

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1 Ms. Cendali, briefly, is there anything further we
2 need to discuss from your point of view?

3 MS. CENDALI: No, your Honor. Thank you for your
4 time.

5 THE COURT: And thank you very much, Mr. Raskopf, for
6 bringing that additional issue to my attention.

7 MR. RASKOPF: Thanks. And we want to work it out, but
8 we've got to just have some stuff, and we'll give them our
9 stuff. That's what it's all about. We should have done it a
10 long time ago, maybe both of us, and now we're going to resolve
11 it, if we can.

12 THE COURT: Thank you very much.

13 MR. RASKOPF: You're welcome.

14 * * *